

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 11, 2002

**GLENN RAY ALCORN v. COFFEE COUNTY
SHERIFF'S DEPARTMENT**

**Appeal from the Circuit Court for Coffee County
No. 31,070 L. Craig Johnson, Judge**

No. M2002-00811-COA-R3-CV - Filed September 5, 2002

The appellant sought return of money he alleges was confiscated from him by the Sheriff's department. Although the department has never responded denying that it holds the money or denying Mr. Alcorn's entitlement to it, the trial court dismissed his petition because he failed to appear at the hearing. He could not appear because he was incarcerated in another state. We vacate the dismissal for failure to prosecute.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Vacated and Remanded**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and WILLIAM C. KOCH, JR., J., joined.

Glenn Ray Alcorn, Terre Haute, Indiana, Pro Se.

MEMORANDUM OPINION¹

Mr. Alcorn alleges that he was arrested on June 17, 1998, by the Coffee County Sheriff's Department and that \$1,355 was confiscated from him at that time. He further alleges that charges against him resulting from that arrest were dismissed. He attempted to retrieve his money from the Sheriff's Department by written letters or demands. Receiving no response from the Department, he filed a motion for the return of his property held by the Sheriff's Department. The trial court

¹Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

dismissed the document, which it termed a Petition to Return Seized Property, on October 15, 2001. The order of dismissal reflects that the petition was heard on October 12, 2001, “whereupon the petitioner Glen R. Alcorn failed to appear and pursue his petition and the court dismissed the said petition.” The order reflects a signature by a district attorney general approving the order.

Mr. Alcorn filed a Motion To Reconsider in which he stated that he had previously sent a letter, a copy of which was attached to the motion, advising the court that he was a prisoner in federal custody and, therefore, would be unable to appear in person unless the court issued a subpoena. After various other filings by Mr. Alcorn, the trial court entered an order on December 11, 2001, denying Mr. Alcorn’s Motion To Reconsider the court’s order of dismissal dated October 15, 2001. The order simply found that the motion was without merit. Again, the order includes a signature indicating approval by a district attorney general.

Mr. Alcorn has appealed from that order. On appeal, Mr. Alcorn maintains that when he was transported to the Coffee County jail, his personal property, \$1,355, was confiscated; that although charges against him were dismissed the money has not been returned to him; he has never been notified of any forfeiture claim or proceeding; and that he has never authorized any other person to claim his property. Therefore, he asserts that the Coffee County Sheriff’s Department has no legal and rightful claim to his personal property.

The record before us does not include any response by the Coffee County Sheriff’s Department to these allegations either in the trial court or in this Court.² Based on the record, the Department has not denied that it holds Mr. Alcorn’s money, denied that he is entitled to have it returned, or otherwise attempted to rebut his allegations or explain its position.

The court did not dismiss Mr. Alcorn’s petition because he was not entitled to the money and made no ruling on the merits of his claims. Instead, the court dismissed his petition because he did not appear in court on the day set for the hearing, even though he was unable to appear because he is incarcerated elsewhere. Our Supreme Court has stated

[A] prisoner has a constitutional right to institute and prosecute a civil action seeking redress for injury or damage to his person or property, or for the vindication of any other legal right; however, this is a qualified and restricted right.

Absent unusual circumstances, prisoners who have filed their civil complaints, unrelated to the legality of their convictions and who have thus protected themselves against the running of any statute of limitations, will not be afforded the opportunity to appear in court to present their cases during their prison terms. Instead such matters will be held in abeyance until the prisoner shall have been released from prison and is in a position to prepare and present his case.

²Although given notice and an opportunity by this court to file a brief, the Department filed nothing herein. Therefore, this court ordered the case submitted on the record and the appellant’s brief.

Whisnant v. Byrd, 525 S.W.2d 152, 153-54 (Tenn. 1975).

The Supreme Court has clarified its holding in *Whisnant*, overruling it to the extent that it may be interpreted to guarantee incarcerated persons the right to a stay of their civil actions and holding that “incarcerated plaintiffs do not retain an absolute right to have civil litigation held in abeyance until they are released from custody, nor do they retain an absolute right to be present at each stage of the proceedings.” *Logan v. Winstead*, 23 S.W.3d 297, 302 (Tenn. 2000).

Instead, we hold that the decision of whether or not to stay civil proceedings for a prisoner is left to the discretion of the trial court. Acting on a case-by-case basis, the trial court must weigh the competing interests of the inmate’s ability to present proof and the burden on the judicial system and the defendant in continuing the action.

Id.

The court also stated that, “It is in everyone’s best interest - the court’s, the plaintiff’s, and the defendant’s - to require the incarcerated litigant’s suit to proceed, when reasonable under the circumstances.” However, when a trial court denies a request for an abeyance, the court should afford the prisoner sufficient time for filing briefs, motions, and pleadings, and for conducting discovery. Further, the Court recognized that many suits can be adjudicated on the pleadings and that many pre-trial matters can be litigated by an inmate in custody and “with the discretion of the trial court in granting necessary extensions of time, prisoners should be able to proceed in accordance with the Rules of Civil Procedure.” *Id.*

Mr. Alcorn has not requested an abeyance; apparently he would prefer to attempt to litigate this matter to the extent possible from prison. As explained in *Logan v. Winstead*, the trial court has a number of options available for such litigation. Until or unless the Department actually puts at issue Mr. Alcorn’s right to the money in dispute, however, none of the issues regarding proper procedure has been raised.

Dismissal of a prisoner’s civil lawsuit for failure to prosecute simply because the prisoner does not appear at a hearing effectively denies the prisoner his or her rights. *Smith v. Peebles*, 681 S.W.2d 567, 569 (Tenn. Ct. App. 1984). Such a dismissal must be vacated. This is especially true where there has been no response to the petition and no objection to the relief requested by the prisoner. See *Conaway v. Lewis*, No. M2000-00617-COA-R3-CV, 2001 Tenn. App. LEXIS 375 (May 24, 2001).

Based on the record before us, we are compelled to vacate the dismissal of Mr. Alcorn’s petition and to remand the case for further proceedings. Upon remand, the Sheriff’s Department should be directed to respond to Mr. Alcorn’s allegations. In the absence of a response, the court shall order the money claimed by Mr. Alcorn returned to him. If a response is filed, the court shall proceed in accordance with the requirements established by the Tennessee Supreme Court.

The judgment of the trial court is vacated, and this matter is remanded to the trial court for further proceedings consistent with this opinion. Costs are waived.³

PATRICIA J. COTTRELL, JUDGE

³Because the Coffee County Sheriff's Department has not appeared in this court, and we have not ordered it to reply on appeal, we are unable to tax the costs to the Department.